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No. 92-592

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FARM FRESH, INC.,
Petitioner,

v.

MICHELE SHAFFER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The instant *certiorari* petition grows out of a lawsuit brought pursuant to § 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), by certain employees of Farm Fresh, Inc. alleging that their employer has violated the FLSA overtime pay provisions, 29 U.S.C. § 207. This FLSA lawsuit was met with three district court orders going to the plaintiffs' representation by legal counsel who also represented Local 400 of the United Food and Commercial Workers ("the Union"),

and to the Union's provision of assistance to the plaintiffs. These orders—which pretermitted the underlying FLSA lawsuit short of the merits—frame the issues presented by the *certiorari* petition.

1. The first of the district court orders at issue came on a motion by the plaintiffs to approve notice to potential plaintiffs of their right to opt-in to this action as provided for in FLSA § 16(b).

The district court denied that motion. In addition, that court ordered "that neither the parties nor the Union, nor anyone acting for them, in their interest, or at their behest, conduct any further activity to attempt to recruit additional plaintiffs in this action until further order of the Court." Pet. App. 3-1.

2. The second district court order in point disqualified the plaintiffs' chosen attorneys. Pet. App. 4-1.

The foregoing order led to a third district court order dismissing the plaintiffs' action when the plaintiffs could not, under the conditions imposed by the district court, secure an attorney. Pet. App. 7-1.

These two linked "disqualification" orders were based on the district court's belief that a conflict of interest might arise between the plaintiffs and the Union as a result of the Union's concurrent efforts to organize the plaintiffs' workplace if Farm Fresh were to offer a confidential settlement of the FLSA lawsuit. Pet. App. 4-10-11.[1]

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[1] The district court acknowledged a substantial identity of interests between the plaintiffs and the Union in that "the plaintiffs' winning the lawsuit would also serve the Union's interests." Pet. App. 4-10. However, in that court's view, the Union's institutional interests might be better served by some kinds of wins than by others:

> If the plaintiffs were to win quickly and quietly, however, through a confidential settlement, for instance, the Union would be unable to take full advantage of the lawsuit in its organizational efforts. [Pet. App. 4-10.]

The district court then speculated that this difference could blossom into a conflict of interest for the plaintiffs' attorneys if the Union

This hypothesized conflict of interests led the district court to instruct the plaintiffs that their attorney must have no professional relationship with the Union and must be willing to handle the case without permitting the Union to provide the plaintiffs any financial assistance. Pet. App. 4-18 & 1-6. When the named plaintiff informed the district court that she could not find an attorney willing to take the case under these conditions and that she was not willing to proceed *pro se*, that court dismissed, without prejudice, her claims and the claims of the opt-in plaintiffs. Pet. App. 7-1.[2]

B. On the plaintiffs' appeal, the Fourth Circuit first took up the district court's disqualification of the plaintiffs' chosen attorneys. The court of appeals held that a disqualification order "rest[ing] on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur" is contrary to the governing federal common law of attorney disqualification. Pet. App. 1-7. Applying this rule of law, the Fourth Circuit determined that the supposed conflict in this case "is much too speculative on the present record to warrant disqualification." Pet. App. 1-9. On this basis, the court of appeals vacated the orders disqualifying the plaintiffs' attorneys and dismissing the plaintiffs' underlying FLSA lawsuit. Pet. App. 1-11.

The Fourth Circuit then turned to the district court's class notice order. The court of appeals stated that it "c[ould] identify no reason for continuing the district court's ban on communication between Shaffer and potential class members." Pet. App. 1-10. The court below,

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were to attempt to pressure the attorneys to resist a confidential settlement. Pet. App. 4-10-11. The district court considered it irrelevant that "Farm Fresh has not yet made any settlement overtures to any of the plaintiffs. . . ." Pet. App. 4-11.

[2] The named plaintiff stated in court that she understood her attorneys' relationship with the Union and that on that understanding she wished to continue with their representation. Fourth Circuit Appendix 138. The district court disregarded this statement.

therefore, vacated the district court's notice order "and remand[ed] with instructions for the district court to approve a balanced notice statement and consent form." Pet. App. 1-11.

ARGUMENT

The *certiorari* petition raises two exceedingly narrow questions: the first having to do with the proper standard of review for district court attorney disqualification orders where the facts are not in dispute; the second with the application of this Court's ruling in *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), to the facts of this case. In neither regard does the petition even claim there is any conflict or confusion in the lower court law. And, as we now show, in both regards the court of appeals' recision is entirely correct and entirely consistent with this Court's decisions. The *certiorari* petition should therefore be denied.

I. THE DISQUALIFICATION ORDER.

A. The Fourth Circuit judged the district court's disqualification of the plaintiffs' chosen attorneys against the following standard:

> [D]isqualification of a litigant's chosen counsel for violation of an ethical canon . . . may not be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur. * * * [S]ome stronger objective indicator—even of "likelihood"—than simple judicial intuition is needed to warrant the drastic step of disqualification of counsel. [Pet. App. 1-7.]

Applying this legal standard, the Fourth Circuit "conclud[ed] that even the likelihood of actual occurrence of [the hypothesized conflict stated by the district court] is much too speculative on the present record to warrant disqualification." Pet. App. 1-9.[3]

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[3] In this regard, the Fourth Circuit noted:

> Certainly the district court pointed to no objective indicators that the chain of events it hypothesized *might* occur, were even

Farm Fresh does *not* challenge the Fourth Circuit's statement of the *governing rule of law*. Rather, the Company challenges the court of appeals' *application* of the stated legal rule to the district court's disqualification and dismissal orders in this case. Pet. 8-15. Farm Fresh contends that "[t]he standard of review of an order disqualifying counsel adopted by the Fourth Circuit in prior decisions" was not applied "[i]n the instant case," because "the Court of Appeals ignored the district court's resolution of the factual disputes. . . ." Pet. 14. In particular, Farm Fresh claims a conflict between the Fourth Circuit decision below and *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978). Pet. 14. The Company's challenge to the decision below suffers from three fatal flaws.

First, the decision below faithfully follows *Aetna*. The Fourth Circuit's *Aetna* opinion expressly adopts the stand-

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incipiently underway, or would "likely" occur. The scenario posited by the court instead had simply to assume the complete unfolding of a series of discrete events, no one of which could be more than the basis of speculation at this point: an offer of settlement favorable to plaintiffs which Farm Fresh required be kept confidential; failure of the Union by that time to have organized the Farm Fresh employees; a decision by the Union to influence counsel to reject the favorable settlement in order to further Union interests; and a decision by counsel to default on their ethical obligation in response. [Pet. App. 1-7-8; emphasis in original.]

The court of appeals noted too that "[n]ot only are positive indicators even of the 'likely' development of the hypothesized conflict of interest weak or non-existent, powerful safeguards against its actual development manifestly are present," Pet. App. 1-8, identifying the following safeguards:

> First off, there is the ethical obligation of counsel. That has now been highlighted by Farm Fresh's motion to disqualify which has prompted specific assurances in response. That obligation's force may not be discounted. Beyond that lies the deterrent effect of sanctions—also highlighted by the proceeding—available were counsel nevertheless ever tempted at the Union's insistence deliberately to delay settlement at the expense of its litigation clients. [Pet. App. 1-8.]

ard of review stated by the Fifth Circuit in *Woods v. Covington Cty. Bank*, 537 F.2d 804 (5th Cir. 1976), for cases where a district court has disqualified an attorney on the basis of an alleged conflict of interests. Under that standard, the court of appeals "review[s] disqualification cases as [it] would most other appeals of a judge's findings, applying the 'clearly erroneous' test to issues of fact while carefully examining a District Judge's application of relevant ethical standards." *Woods*, 537 F.2d at 810. Thus, "'[i]n disqualification cases such as this, where the facts are *not* in dispute . . . ,' . . . it is appropriate for [the appellate court] 'to determine whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles.'" *Aetna*, 570 F.2d at 1200, quoting *Woods*, 537 F.2d at 810 (emphasis added).[4]

Citing the passage from *Aetna* quoted immediately above, Pet. App. 1-7, the court of appeals panel here stated that the district court's disqualification order was subject to *de novo* review for the obvious reason that "the facts are not in dispute . . . ," *Aetna*, 570 F.2d at 1200.[5] And, as already noted, the court of appeals then

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[4] The *Woods* standard of review applies in cases such as this, which "present questions of the legal application of specific standards set forth in the Code of Professional Responsibility." *Norton v. Tallahassee Memorial Hospital*, 700 F.2d 617, 619 (11th Cir. 1983). By contrast, where a "particular disqualification decision . . . [is] closely linked to the trial judge's responsibility to supervise the conduct of the case before him . . . [it is] properly reviewed under the abuse of discretion standard." *Id.*

[5] In disqualifying the plaintiffs' attorneys, the district court relied on the following facts: the Union arranged for attorneys, who also represent the Union, to represent the plaintiffs; the Union advanced some of the costs of litigation; and the Union was conducting an apparently unsuccessful organizing drive among Farm Fresh employees. Pet. App. 4-9-11. In addition, Farm Fresh suggests that the district court may have relied upon the contents of Union flyers describing this lawsuit and the fact that duplicate

concluded that the district court's order was *not* predicated upon a proper understanding of the relevant ethical principles. It is, therefore plain on the face of the opinion below that the panel decision in this case is entirely consistent with the *Aetna* decision.

Second, the standard of review stated in *Aetna* and in the decision below is undoubtedly the correct standard of review. Where the historical facts are *not* in dispute and where the trial court has held that disqualification is required by ethical principles concerning conflicts of interest, the only standard against which an appellate court can sensibly judge the disqualification order is whether the order was based on a proper understanding and application of those ethical principles. *Aetna*, 570 F.2d at 1200. This is the normal standard of review where a district court has applied a rule of law to uncontested facts.[6]

Third, to this point we have indulged the assumption that a demonstration that a court of appeals' panel failed to faithfully follow its own circuit precedents is a con-

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forms were filed for 3 of the 125 opt-in plaintiffs. Pet. 12. None of these facts are contested.

[6] Indeed, it was particularly incumbent upon the court of appeals to insure that the disqualification order here was based on a proper application of the applicable ethical principles. The district court not only disqualified the plaintiffs' chosen attorneys, that court barred the plaintiffs from employing any attorney who represented the Union or who allowed the Union to financially assist the plaintiffs in prosecuting their claims. Pet. App. 1-6. The immediate and intended result of the district court's orders was to infringe the plaintiffs' "First Amendment guarantees of free speech, petition, and assembly [which] give . . . workers the right to cooperate in helping and advising one another in asserting their rights under the [federal labor statutes]." *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 578-79 (1971). The proximate—and we would say foreseeable—result of these orders was the dismissal of the plaintiffs' claims when the plaintiffs were unable to find a legal representative willing to proceed under the district court's conditions.

sideration that militates in favor of a grant of a *certiorai* petition. We would be remiss, however, if we were to conclude without expressly stating that Farm Fresh's assumption in this regard is unsound. *See Davis v. United States*, 417 U.S. 333, 340 (1974). The proper method for resolving an *intra-circuit* conflict is a petition for rehearing *en banc*. In this case such a petition was filed and was denied without a single Fourth Circuit judge voting for rehearing.

B. In addition to claiming that the court below ignored the "standard of review . . . adopted by the Fourth Circuit in prior decisions," Farm Fresh asserts that the Fourth Circuit's decision "flies in the face of the rule set forth in *Anderson v. Bessemer City*[, 470 U.S. 564 (1985)]." Pet. 14. This claim is even more lacking in merit than the claim that the decision below misapplies the Fourth Circuit's own precedents.

In contrast to *Aetna*, which at least is in point, *Anderson* does not involve any issue relevant to the review of attorney disqualification orders that rest on uncontested historical facts. Instead, *Anderson*—like its precursor, *Pullman-Standard v. Swint*, 456 U.S. 273 (1982)—defines the correct level of appellate scrutiny with respect to district court findings regarding the *purely factual question of an employer's state of mind, viz.*, whether the employer made a particular employment decision for discriminatory reasons. The *legal* question addressed below —whether a "disqualification of litigant's chosen counsel for violation of an ethical canon . . . may . . . be rested on mere speculation that a chain of events whose occurrence theoretically could lead counsel to act counter to his client's interests might in fact occur," Pet. App. 1-7—is qualitatively different from the *factual* question that precipitated the *Anderson* decision. Not surprisingly, then, as the lower courts have recognized, the proper standard of review here is qualitatively different from the "clearly

erroneous" standard that governs the review of district court determinations of questions of fact.[7]

II. THE NOTICE ORDER.

A. Having determined that the plaintiffs' chosen counsel should not have been disqualified and that the Union's assistance to the plaintiffs in bringing this case was not improper, the Fourth Circuit could "identify no reason for continuing the district court's ban on communication between Shaffer and potential class members." Pet. App. 1-10.[8] The court of appeals, therefore, "vacate[d] the district court's Notice Order and remand[ed] for lower court approval of an appropriate notice statement and consent form." Pet. App. 1-11.

B. In its *certiorari* petition, Farm Fresh challenges the court of appeals' direction that the district court "approve a balanced notice statement and consent form for distribution," Pet. App. 1-11, as being contrary to this

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[7] Farm Fresh describes *Kamean v. Local 363, I.B.E.W.*, 109 FRD 391 (S.D.N.Y.), *app. dism'd.*, 833 F.2d 1002 (2d Cir. 1986), *cert. denied*, 481 U.S. 1024 (1987), as "a case that is analogous to the case at bar in principle" in which the district court found that "disqualification was proper." Pet. 13, n.9. However, *Kamean* did *not* involve *any* question of disqualification. Rather, the district court refused to certify a class in a duty of fair representation case on the grounds that the named plaintiffs and their attorneys had ties to an organization that was demonstrably hostile to the defendant union and that many of the absent class members belonged to the defendant union. The *Kamean* court did *not* prohibit the plaintiffs from being represented by their chosen attorneys.

[8] The court of appeals "review[ed] for an abuse of discretion the district court's Notice Order, which prohibited Shaffer from contacting potential class members." Pet. App. 1-10. In so defining the standard of review with respect to the district court's notice order, the Fourth Circuit relied upon this Court's statement in *Hoffman-LaRoche, Inc. v. Sperling*, *supra*, 493 U.S. at 169-70, that "district courts have discretion, in appropriate cases, to implement [FLSA] § 216(b) . . . by facilitating notice to potential plaintiffs."

Court's decision in *Hoffman-LaRoche v. Sterling*, *supra*. Pet. 16-18.[9] That challenge is insubstantial.

The *Hoffman-LaRoche* Court expressly recognized that the benefits of FLSA class actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." 493 U.S. at 170. The court of appeals' ruling quotes and follows this statement of the FLSA's purpose and effect. Pet. App. 1-10. And, the court below properly recognized that this portion of *Hoffman-LaRoche* all but requires the conclusion that the district court order was an abuse of discretion. Thus, there is nothing to Farm Fresh's contention that the Fourth Circuit's requirement of a "balanced notice statement," Pet. App. 1-11, is in conflict with *Hoffman-LaRoche*. There is even less to the Company's contention that the Fourth Circuit's decision denies the district court *any* discretion in "implement[ing] [FLSA] § 216" to "facilitat[e] notice to potential plaintiffs" accorded by the governing law as stated in *Hoffman-LaRoche*.[10]

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[9] *Hoffman-LaRoche* involved claims under the Age Discrimination in Employment Act, 29 U.S.C. § 623. Section 7(b) of the ADEA incorporates the enforcement provisions of FLSA § 16(b), 29 U.S.C. § 626(b), which is the statute at issue here. *See Hoffman-LaRoche*, 493 U.S. at 167-168.

[10] The supposedly "inflammatory and potentially misleading" union literature referred to by Farm Fresh in its defense of the district court's communication ban is quoted in the Fourth Circuit's opinion. Pet. App. 1-5 n.2. This literature is only "inflammatory" in the sense that it encourages Farm Fresh employees to support the Union's organizing efforts and to join the lawsuit as plaintiffs. It is "potentially misleading" only to the extent that one believes Union organization and prosecution of the lawsuit will not materially benefit Farm Fresh employees. It is quite clear that Farm Fresh does not wish its employees to be moved to action in either respect, but the Company's wishes do not provide adequate grounds for denying potential plaintiffs the sort of "balanced notice statement" provided for by the Fourth Circuit. Pet. App. 1-11.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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